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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CHRISTOPHER M. WILKERSON, Plaintiff and Respondent, v. MICHAEL PORTNER et al., Defendant and Appellant.	B209006 (Los Angeles County Super. Ct. No. BC362212)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Highberger, Judge. Affirmed.

Portner Law Offices and Michael G. Portner for Defendant and Appellant.

Harting, Simkins & Ryan, LLP, and Gary S. Simkins for Plaintiff and Respondent.

Appellant Michael Portner appeals from a summary judgment entered on respondent Christopher M. Wilkerson's claim for breach of contract. We affirm.

FACTUAL BACKGROUND[1]

Appellant Portner is an attorney. Respondent Wilkerson is a chiropractor. From February 1999 through August 2000, Wilkerson provided chiropractic services to Portner's client, Junas Taclay, who had been injured in an automobile accident in February 1999. Wilkerson charged Taclay $2,095.66 for his services.[2]

On January 17, 2001, Taclay and Portner executed a document entitled "Lien Authorization to Pay Chiropractic Fees - and Constructive Trust for the Chiropractor" (Lien Authorization). The Lien Authorization had two parts. Under the first part, the "Patient Agreement," Taclay authorized Wilkerson to furnish his attorney (Portner) with medical information and authorized Portner to pay Wilkerson for his chiropractic services from any funds held for Wilkerson in his client trust account. It further stated that Taclay was "directly and fully, personally responsible to the above Chiropractor for all chiropractic billing and that this obligation [was] not contingent upon [his] receiving any settlement for [his] claim." (Italics omitted.) The Patient Agreement also contained the following provision: "I agree to be responsible for any legal fees, court, or collection agency costs incurred, which are necessary to enforce this agreement. Those additional expenses for legal or collection agency fees or court costs, will be added on top of the billings and/or fees of said Chiropractor along with the highest interest rate

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1 The parties filed cross-motions for summary judgment below. The facts set forth are taken from the parties' statements of undisputed facts and the accompanying exhibits.

2 Portner disputed the precise amount of the charges in the court below, but the trial court ruled Wilkerson had established the amount claimed, and Portner does not dispute the court's finding on appeal.

permitted by law, calculated from the date chiropractic services were first rendered. I understand that, in view of the protracted time for cases to be tried, I waive any right to statute of limitations for collections."

Portner executed the Lien Authorization's second part, the "Attorney Agreement." Under its provisions, Portner agreed (1) "to observe all the terms of the above Chiropractic Lien"; (2) "to withhold such sums In Trust from any payments, proceeds, dispositions, settlements, judgments, or verdicts as may be necessary to adequately protect said Chiropractor"; (3) "to notify said Chiropractor in writing, at such time as this patient's case is surrendered to the patient/client or is transferred to a new attorney"; (4) "after receiving monies to send payment to said Chiropractor within thirty (30) days or be charged additional finance charge at the highest interest rate permitted by the law for every month that the suit has been settled and/or chiropractic payments have been received and said Chiropractor remains unpaid"; and (5) "to pay all legal fees and court costs should this lien necessitate enforcement through the legal process."

Fifteen months after the Lien Authorization was executed, on April 10, 2002, Portner received a check in the amount of $15,000 from Taclay's insurer. Portner subtracted his fees and costs and disbursed the remainder of the funds (approximately $10,000) to Taclay. He made no payment to Wilkerson.

More than a year later, in June 2003, Wilkerson's office manager called Portner and Taclay to determine the status of Taclay's personal injury claim. She learned from Taclay that the claim had been settled for $15,000. In October 2003, the office manager mailed a letter to Portner demanding payment.

PROCEEDINGS BELOW

On November 20, 2006, within four years of learning of Taclay's recovery and the distribution of the proceeds, Wilkerson filed a complaint against Portner

and Taclay. The complaint asserted, among other things, a claim for breach of contract.[3]

The parties filed cross-motions for summary judgment or summary adjudication. Portner contended the breach of contract and related claims were barred by the statute of limitations contained in Code of Civil Procedure section 340.6 (section 340.6). Wilkerson's cross-motion on his breach of contract claim was based on Portner's agreement to pay for his chiropractic services from the recovery and Portner's failure to do so. With respect to the statute of limitations defense, Wilkerson contended: (1) section 340.6 applies only to legal malpractice claims or other related claims pursued by a client; (2) Portner waived any statute of limitations defense by signing the chiropractic lien; and (3) Wilkerson timely filed his complaint under Code of Civil Procedure section 337, the four-year statute of limitations for breach of written contracts, under the delayed discovery rule.

The court granted Wilkerson's motion for summary adjudication on the breach of contract claim on the ground that Portner had waived any statute of limitations defense by executing the Attorney Agreement portion of the Lien Authorization. Judgment was entered in favor of Wilkerson. Portner appealed.

DISCUSSION

A. *Section 340.6*

Portner's primary contention on appeal is that Wilkerson's claims are governed by the statute of limitations contained in section 340.6, which provides:

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3 The complaint also contained a fraud claim which the trial court resolved in Portner's favor. Wilkerson does not attempt to revive the fraud claim. Wilkerson voluntarily dismissed the other claims set forth in the complaint (constructive fraud, conversion, breach of fiduciary duty, negligence and declaratory relief) after the trial court granted summary judgment in his favor on the breach of contract claim.

"An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first." (§ 340.6, subd. (a).)[4] Portner argues that because he signed the Attorney Agreement portion of the Lien Authorization in his capacity as Taclay's lawyer and the judgment to which Wilkerson's lien attached resulted from professional services rendered on behalf of Taclay, Wilkerson's claims were based on "a wrongful act or omission . . . arising in the performance of professional services."[5] He interprets the phrase as applying not only to claims for legal malpractice or professional negligence, but to any claim that "relates to" professional services by an attorney.[6]

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[4] If section 340.6 applies, the complaint was untimely: Wilkerson learned of the wrongful act in June 2003, but did not file suit until November 2006.

[5] "A lien is a charge imposed . . . upon specific property by which it is made security for the performance of an act." (Civ. Code, § 2872.) A lien may be created "[b]y contract of the parties" (Civ. Code, § 2881), and may be created "upon property not yet acquired by the party agreeing to give the lien, or not yet in existence" (Civ. Code, § 2883). Here, Taclay granted a lien to Wilkerson on the expected recovery for his case and Portner agreed to pay Wilkerson for his services out of his client trust fund for Taclay once sufficient funds were recovered. Portner does not question the validity of the lien or that sufficient funds were recovered to pay Wilkerson. Portner contends only that the statute of limitations contained in section 340.6 barred the claim.

[6] In his reply, Portner disavows the argument of his opening brief that section 340.6 should be construed as applying to any claim "relating to" the provision of professional services, noting that the language of the section is "arising in the performance of," not "relating to." He contends the provision applies to all obligations that "directly arise[] from, and exist[] because of, [the attorney's] rendering of professional services." For the reasons explained below, we do not find the distinction, if any, dispositive.

Portner's contention is based on an overly-broad reading of the language of section 340.6. A review of its legislative history and the decisions to have considered the legislative purpose behind section 340.6 convinces us that section 340.6 applies only to actions for legal malpractice and has no applicability here.[7]

Section 340.6 was enacted in reaction to the Supreme Court's decisions in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176 (*Neel*) and *Budd v. Nixen* (1971) 6 Cal.3d 195 (*Budd*). (See *Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 (*Beal Bank*).) Prior to *Neel* and *Budd*, the statute of limitations applicable to attorney malpractice actions -- generally Code of Civil Procedure section 339, subdivision (1), the two-year statute -- ran from the date of the negligent act. (See *Beal Bank*, 42 Cal.4th, *supra*, at p. 509.) The Supreme Court held in *Neel* and *Budd* that the statute should instead run from the date of discovery or the date the plaintiff suffered actual and appreciable harm. (*Beal Bank*, *supra*, at p. 509.) As a result, an "'increased burden'" was placed on the legal profession, extending potential liability from acts of negligence far into the future, and leading to rapidly rising malpractice rates. (*Ibid*., quoting *Neel*, *supra*, 6 Cal.3d at p. 192; see *Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1367 (*Stoll*), quoting Mallen, *Panacea or Pandora's Box? A Statute of Limitations for Lawyers* (1977) 52 State Bar Journal 22, 24 ["[Prior to the enactment of section 340.6,] California attorneys were subject to 'literally indeterminate liability' due to

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[7] "Unless the meaning of the statute is apparent on its face, a court must give it an interpretation based upon the legislative intent with which it was passed." (*Board of Retirement v. Lewis* (1990) 217 Cal.App.3d 956, 964.) "[L]egislative records may be looked at to determine legislative intention, and it will be presumed that the Legislature adopted the proposed legislation with the intent and meaning expressed in committee reports." (*Southland Mechanical Constructors Corp. v. Nixen* (1981) 119 Cal.App.3d 417, 427-428, disapproved in part on other grounds in *Laird v. Blacker* (1992) 2 Cal.4th 606 (*Southland*).)

the adoption of the 'discovery rule' by which malpractice limitations period[s] are triggered by the client's discovery of the wrongdoing, not its date of occurrence."].)

The primary purpose behind section 340.6 was to place reasonable restrictions on the discovery rule in order to decrease the cost of malpractice insurance and to create a uniform period of limitations for legal malpractice claims. (*Beal Bank*, *supra*, 42 Cal.4th at p. 511; *Southland*, *supra*, 119 Cal.App.3d at pp. 427-428.) In drafting section 340.6, the Legislature was influenced by a State Bar Journal article, in which the author, Ronald E. Mallen, had advocated in favor of "'a specially tailored statute of limitations for legal malpractice' as a solution to the crisis of the 'enormous increase of insurance premiums . . . accompanied by a dramatic decline in the number of companies willing to insure attorneys.'" (*Stoll*, *supra*, 9 Cal.App.4th at p. 1367, quoting Mallen, *supra*, 52 State Bar J. at p. 22; see *Southland*, *supra*, 119 Cal.App.3d at pp. 428-429.) Mallen had further stated, based on his review of malpractice statutes of limitations enacted in other states and decisional law from those states, that "'malpractice' is not in itself a word of precise definition" and that "[l]egal malpractice" would best be stated "'in terms of the actual wrong,'" which he defined as "'a wrongful act or omission occurring in the rendition of professional services.'" (Mallen, *supra*, 52 State Bar J. at p. 22; see *Stoll*, *supra*, 9 Cal.App.4th at p. 1368.) The statute of limitations proposed by Mallen was very similar to the final version of section 340.6. (See Mallen, *supra*, 52 State Bar J. at p. 24; *Stoll*, *supra*, 9 Cal.App.4th at p. 1368.)

In the years since section 340.6 was added to the Code of Civil Procedure, numerous courts have had occasion to review its legislative history in a variety of contexts. In every case, the courts concluded that the legislative intent was to adopt a special statute of limitations to encompass claims based on legal malpractice. (See, e.g., *Stoll*, *supra*, 9 Cal.App.4th at p. 1368 ["[In enacting

section 340.6,] [t]he Legislature intended to enact a comprehensive, more restrictive statute of limitations for practicing attorneys facing malpractice claims."]; *Southland, supra*, 119 Cal.App.3d at p. 429 ["[T]he Legislature, in enacting section 340.6 after consideration of Mallen's proposal . . . intended that section 340.6 apply to both tort and breach of contract malpractice actions."]; *Laird v. Blacker, supra*, 2 Cal.4th at p. 609 ["[W]hen the Legislature adopted section 340.6 in 1977, it implicitly . . . codified the discovery rule of [*Neel* and *Budd*] . . . [which held] that a cause of action for legal malpractice accrues when the client discovers or should discover the facts essential to the malpractice claim, and suffers appreciable and actual harm from the malpractice."]; see also *Review of Selected 1977 California Legislation* (1978) 9 Pacific L.J. 672, 676 ["[Section 340.6] creates a separate statute of limitation for professional negligence suits against an attorney similar to that for medical malpractice actions."].)

The reasoning in *Southland* is instructive. There, the plaintiff, seeking to avoid application of section 340.6, argued that the section was limited to legal malpractice actions sounding in tort. Rejecting the argument that the phrase "wrongful act or omission" should be so limited, the court held that the modifying phrase "arising in the performance of professional services" made "clear that section 340.6 applies to legal malpractice actions against attorneys" and thus encompassed such claims based on breach of contract. (*Southland, supra,* 119 Cal.App.3d at p. 426, italics omitted.) To hold otherwise, the court concluded, would frustrate the legislative purpose of establishing a uniform statute of limitations for attorney malpractice. (*Id*. at p. 429 ["Statutes should be construed with reference to the legislative object sought to be accomplished. [Citations.]"].) The *Southland* court thus recognized that section 340.6 should be construed in the context to which it was intended to apply, namely attorney malpractice claims.

More recently, in *Knoell v. Petrovich* (1999) 76 Cal.App.4th 164, 169, the court was asked to consider whether the tolling provisions of section 340.6 applied to a nonclient's suit against an attorney for defamation and related claims. The alleged defamation had occurred during the course of the attorney's representation of a client in a dispute with the plaintiff over an easement. Describing section 340.6 as "the . . . statute of limitations for legal malpractice," the court found no authority for the "novel claim that a third party (i.e., a nonclient) may invoke Code of Civil Procedure section 340.6 to toll the statute of limitations when suing an attorney for defamation." (*Knoell v. Petrovich, supra,* 76 Cal.App.4th at p. 169.)

Portner's contention is similar to those addressed in *Southland* and *Knoell v. Petrovich*. He contends that the phrase "arising in the performance of professional services" should be interpreted without regard to the legislative purpose behind the enactment of section 340.6. He contends it should cover any claim arising "directly from" or "relating to" an attorney's provision of professional services to a client. We agree with those courts that the phrase, while broad enough to encompass all types of claims for attorney malpractice, whether stated as tort or breach of contract, is limited to claims arising from an attorney's wrongful acts or omissions in the performance of professional duties to a client. Portner committed a wrong during the course of his representation of Taclay by failing to pay Wilkerson's medical lien from the proceeds of the recovery. However, the duty Portner breached arose not from any attorney-client relationship, but from the Attorney Agreement portion of the Lien Authorization. Nothing in the legislative history of section 340.6 or the cases construing the statute suggests that the phrase

"arising in the performance of professional services" was intended to encompass the claims of medical lienholders.[8]

B. *Section 337*

Wilkerson contends, and Portner does not dispute, that if section 340.6 is inapplicable, Wilkerson's claim is governed by the four-year statute of limitations contained in Code of Civil Procedure section 337, which applies to "[a]n action upon any contract, obligation or liability founded upon an instrument in writing . . . ." The parties debate whether Portner's signature on the Attorney Agreement portion of the Lien Authorization represented an agreement to waive the statute of limitations defense. The trial court determined that Portner's promise to "observe the terms of the Chiropractic Lien" constituted such a waiver. On appeal, Portner

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[8] The authorities on which Portner attempts to rely for the proposition that section 340.6 applies to all claims that "relate[] to" professional services rendered by the attorney, are not to the contrary. In *Radovich v. Locke-Paddon* (1995) 35 Cal.App.4th 946, a potential beneficiary of a will sued the drafting attorney for malpractice and breach of fiduciary duty when the client, the plaintiff's wife, died without executing the will. Without deciding the issue, the court assumed pursuant to the parties' agreement that section 340.6 applied to the breach of fiduciary duty claims. (*Radovich v. Locke-Paddon, supra,* 35 Cal.App.4th at p. 966.) *Stoll, supra,* 9 Cal.App.4th 1362 and *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, also cited by Portner, support our conclusion that section 340.6's applicability is confined to legal malpractice actions. The court in *Stoll* held that a client's claim for breach of fiduciary duty which arose in the context of an attorney's representation in a legal matter was covered by section 340.6. (*Stoll, supra,*9 Cal.App.4th at pp. 1368-1369.) In *Quintilliani,* which held section 340.6 inapplicable to a claim for negligence based on the defendant attorney's deficient provision of administrative consulting services, the court stated: "An attorney who undertakes to provide both legal and nonlegal services to a client, and who is sued because of deficiencies in performing the nonlegal services may not claim the protection of section 340.6 because '[t]he California statute does not include actions for wrongs by the defendant that were not committed as an attorney . . . The statute only applies to the performance of legal services.'" (*Quintilliani v. Mannerino, supra,* 62 Cal.App.4th at p. 65, quoting 2 Mallen & Smith, Legal Malpractice (4th ed. 1966) § 21.8, pp. 763-764, italics omitted.)

argues that the court's construction would lead to an absurd result -- an agreement on Portner's part to undertake *all* of Taclay's responsibilities under the Patient Agreement, including the responsibility to pay the chiropractic bill regardless of whether there was any recovery on the personal injury claim. We need not resolve that issue because we conclude Wilkerson's suit was timely under the four-year statute of limitations and the delayed discovery rule.

As explained in *Gryczman v. 4550 Pico Partners, Ltd*. (2003) 107 Cal.App.4th 1, the delayed discovery rule, although not generally applicable to breach of contract claims, should be applied to breaches that "'can be, and are, committed in secret,'" where "'the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time.'" (*Id*. at pp. 4-5, quoting *April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 832.) In *Gryczman*, the defendant agreed to honor a right of first refusal, but sold the property without giving notice to the holder of the right. The plaintiff did not discover the property had been sold for several years and brought suit more than four years from the date the agreement to sell the property was recorded. The court held: "[T]he running of the statute of limitations was tolled until such time as plaintiff knew or should have known of the wrongful conduct at issue." (*Gryczman v. 4550 Pico Partners, Ltd*., *supra,* 107 Cal.App.4th at p. 6.)

The court reached the same conclusion in *April Enterprises, Inc. v. KTTV*, *supra*, 147 Cal.App.3d 805, where the defendant breached its promise to preserve videotapes of television shows which were in its exclusive custody and control and the plaintiff did not discover the breach until years after the tapes had been erased. In holding that the delayed discovery rule applied, the court stated: "To hold . . . that [the plaintiff's] action accrued on the date of erasure, would amount to an expectation that a contracting party in such situations has a duty to continually monitor whether the other party is performing some act inconsistent with one of

many possible terms in a contract. Imposing such a duty to monitor is especially onerous when the breaching party can commit the offending act secretly, within the privacy of its own offices." (*Id*. at p. 832.) "[P]laintiffs should not suffer where circumstances prevent them from knowing they have been harmed. . . . [D]efendants should not be allowed to knowingly profit from their injuree's ignorance." (*Id*. at p. 831.)

The same circumstances that persuaded the courts in *Gryczman* and *April Enterprises* to apply a delayed discovery rule are present here. Wilkerson was not a party to Taclay's personal injury claim and relied on Taclay and Portner to keep him apprised. The claim was settled, and Portner distributed the proceeds in derogation of his contractual obligation to Wilkerson, who learned of the settlement a year later. Wilkerson filed suit within four years of the date of discovery. His claim for breach of contract was thus timely.

DISPOSITION

The judgment is affirmed. Respondent is to recover his costs on appeal.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.